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Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, *ET AL.*,

Petitioners,

—v.—

FREE SPEECH COALITION, *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONERS

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28 pp

No. 00-795

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*, *Petitioners*,

V.

FREE SPEECH COALITION, *ET AL.*, *Respondents*.

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Amicus curiae, Morality in Media, Inc., hereby moves this Honorable Court, pursuant to Supreme Court Rule 37(b), for an order granting leave to file the attached Brief *Amicus Curiae* in support of the Petitioners. Consent was granted by Petitioners and withheld by Respondents.

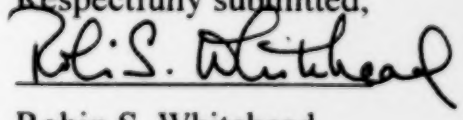
Morality in Media, Inc. ("MIM") is a New York non-profit, interfaith, charitable corporation founded in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. MIM also focuses on legal and law enforcement issues related to child pornography and material harmful to minors. Due to the rapid increase in the use of the Internet for purposes of distributing child pornography and obscenity, MIM has expanded its focus to include the legal issues concerning this new form of communication.

MIM has a special interest in the subject matter of this appeal, since our legal and public policy advocates are frequently sought out by federal and state legislators for assistance and advice on efforts to protect children from exploitation and material that is harmful to them. MIM has filed several friend of the court briefs to this Honorable Court including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); and *City News and Novelty, Inc. v. City of Waukesha*, ___ U.S. ___ (2001).

Counsel for *amicus*, Robin S. Whitehead, provides legal assistance to prosecutors, police, public officials, legislators, community and civic leaders, and citizens on issues of obscenity, child pornography, material harmful to minors, public indecency, obscene and indecent broadcasting and the regulation of sexually oriented businesses. Ms. Whitehead has lectured at seminars, conferences and has provided workshops to citizen groups and pro-family organizations nationwide relative to the above areas of law.

For the foregoing reasons, *amicus* respectfully requests that this Court grant its Motion for Leave to File a Brief as *Amicus Curiae*.

Respectfully submitted,



Robin S. Whitehead
Counsel of Record

No. 00-795

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

JOHN ASHCROFT, ATTORNEY GENERAL
OF THE UNITED STATES, *ET AL.*,
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BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC.
IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. ("MIM") as *amicus curiae*,[1] files this brief in support of the Petitioners in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. *Amicus* informs the Court that consent was granted by Petitioners and withheld by Respondents, therefore your *amicus* has submitted a Motion for Leave to File this Brief *Amicus Curiae*.[2]

MIM is a New York, non-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

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[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Robin S. Whitehead of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus* made any monetary contribution to the preparation or submission of this brief. Rule 37 (6).

[2] A copy of Petitioners' consent, sent by Barbara D. Underwood, Acting Solicitor General, and a copy of Respondents' denial of consent, sent by H. Louis Sirkin, Esq., are being filed concurrently with this brief.

MIM has an interest in this case because it is frequently asked by federal and state law enforcement agencies, legislators, and private citizens for advice and guidance on methods to enforce and improve existing laws concerning the regulation of child pornography and exploitation, and child sexual abuse. MIM recognizes this case to be a major precedent in regulating the production, distribution and possession of both actual or authentic and virtual or realistic child pornography.

MIM has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); and *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803, 120 S.Ct. 1878 (2000); and *City News and Novelty, Inc. v. City of Waukesha*, ___ U.S. ___ (2001).

Amicus is filing this brief in support of the Petitioners because we believe our brief contains relevant matter and alternative arguments that should be heard and may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

Advances in computer imaging technology have provided child pornographers the ability to create child pornography without using real children. Because these computer-generated images are virtually indistinguishable from child pornography using real children, federal child pornography laws have become ineffective for two reasons. First, since real children are no longer needed, these computer-generated pornographic materials are outside the reach of the "old" federal child exploitation laws, 18 U.S.C. §§ 2251, 2252. Second, where real children are still used, image-altering software can transform sexually explicit material in such a manner making it impossible for prosecutors to either identify the persons in the material or to prove that real children were used in producing the material.

To close these loopholes, Congress enacted 18 U.S.C. § 2252A and added the definition of "child pornography" in Section 2256(8), as part of the Child Pornography Prevention Act of 1996 ("CPPA"). In *Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999), the Court of Appeals held unconstitutional the definition of child pornography and other related provisions found in the CPPA, reasoning that Congress may only prohibit child pornography where actual children are used to produce the pornographic materials, but that Congress may not constitutionally proscribe virtual child pornography. *Id.* at 1092-1097. The Ninth Circuit's decision created a split in authority with the First, Fourth and Eleventh Circuits along with other federal district courts. *United States v. Hilton*, 167 F.3d 61 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 115 (1999); *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000); *United States v. Acheson*, 195 F.3d 645 (11th Cir. 1999); *United States v. Pearl*, 89 F.Supp.2d 1237 (D. Utah 2000); *United States v. Fox*, 74 F.Supp.2d 696 (E.D. Texas 1999); *Free Speech Coalition v. Reno*, No. C 97-0281 VSC, 1997 WL 487758 (N.D. Cal. Aug. 12, 1997).

Amicus argues that the Ninth Circuit's holding in *Free Speech* is contrary to case law precedent and detailed congressional findings which indicate that the CPPA's prohibition of computer-generated child pornography is constitutionally permissible. Specifically, *amicus* urges this Court to hold that 18 U.S.C. § 2252A is a category of unprotected expression, since very limited, if any, First Amendment interest exists in the conduct of viewing or distributing virtual child pornography, while Congress, on the other hand, has enumerated compelling interests in banning such materials.

ARGUMENT

I. VIRTUAL CHILD PORNOGRAPHY DESERVES NO PROTECTION UNDER THE FIRST AMENDMENT

Computer-generated child pornography, which is indistinguishable from photographs of real children, should not enjoy First Amendment protection. This Court has found certain types of activities to be outside the protection of the First Amendment. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (intentionally uttering fighting words); *Beauharnais v. Illinois*, 343 U.S. 250, 252 (1952) (recklessly publishing a libel); *Roth v. United States*, 354 U.S. 476, 486 (1957) (knowingly distributing obscenity); *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (knowingly distributing child pornography), and *Osborne v. Ohio*, 495 U.S. 103, 111 (1990) (knowingly possessing child pornography).

The *Free Speech* Court below also erred in applying strict scrutiny analysis and instead should have applied a balancing approach, as this Court did in *New York v. Ferber*, 458 U.S. at 756, and *Osborne v. Ohio*, 495 U.S. at 108-14. Further, the Ninth Circuit was incorrect to hold that Congress did not have a compelling reason for enacting the CPPA. The issue before this Court is what weight will be afforded the social value of such material, and the act of distributing it, versus the government's interests in prohibiting the interstate traffic in real or counterfeit child pornography.

This Court has sustained statutes aimed at protecting the physical and psychological well-being of children, "even when the laws have operated in the sensitive area of constitutionally protected rights." *Ferber*, 458 U.S. at 757, citing *Prince v. Massachusetts*, 321 U.S. 158 (1944) (statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First

Amendment activity); *Ginsberg v. New York*, 390 U.S. 629 (1968) (New York law protecting children from exposure to non obscene literature held constitutional); and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children).

Moreover, this Court and other courts have recognized that legislatures are "entitled to greater leeway in the regulation of pornographic depictions of children." *Ferber*, 458 U.S. at 756; *United States v. Knox*, 32 F.3d 733, 752 (3rd Cir. 1994); *United States v. Acheson*, 195 F.3d 645, 650 (11th Cir. 1999); *United States v. Matthews*, 209 F.3d 338, 343 (4th Cir. 2000); and *United States v. Pearl*, 89 F.Supp.2d 1237, 1240 (D. Utah 2000).

A. Virtual Child Pornography has Little or No Social Value

The Ninth Circuit did not consider that both real and virtual child pornography have no "redeeming" social value. In *Ferber*, the Supreme Court, holding that child pornography is outside the protection of the First Amendment, found that the value of child pornography "is exceedingly modest, if not *de minimis*." 458 U.S. 747, 762 (1982). *See also*, *Osborne*, 495 U.S. at 108; *United States v. Bausch*, 140 F.3d 739, 742 (8th Cir. 1998), *cert. denied*, 525 U.S. 1072 (1999); *United States v. Hilton*, 167 F.3d 61, 70 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 115 (1999); and *United States v. Matthews*, 209 F.3d 338, 343 (4th Cir. 2000).

Focusing on this argument in *Osborne*, this Court expanded the proscriptions on child pornography and allowed states to ban private possession of child pornography. *Osborne*, *supra*. In doing so, the Court made a

distinction between adult pornography and child pornography, recognizing that the state's interests in *Osborne* were more important or compelling than those presented in *Stanley v. Georgia*, 394 U.S. 557 (1969). As stated in *Osborne*, 495 U.S. at 108:

> But assuming, for the sake of argument, that Osborne has a First Amendment interest in viewing and possessing child pornography, we nonetheless find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*.

Virtual child pornography, in terms of its social value, should be treated the same as real child pornography. As articulated by the dissent below, 198 F.3d at 1100-01, both real and counterfeit child pornography contain depictions that look like real children engaging in sexually explicit activity. Because of this reason, virtual or realistic child pornography, like actual or authentic child pornography, is of "slight social value" and constitutes "no essential part of the exposition of ideas." That the only difference between real child pornography and virtual child pornography is that the former uses actual children in its production, whereas the latter may not, "does not somehow transform virtual child pornography into meaningful speech." (Ferguson, J., dissenting).

Since § 2252A only proscribes activities with "child pornography" as defined in § 2256 (8) that is or appears to the viewer, adult or child, to be images of real children engaging in sex or whose genitals are lasciviously exhibited, what is proscribed under § 2252A must look exactly like what is proscribed under § 2252 as if it were produced in violation of § 2251. This is the clear legislative intent of Congress. *See* Congressional Findings for Pub. L. 104-

208, *SEE* ANNOTATIONS FOLLOWING 18 U.S.C. § 2251 and S. REP. NO. 358, 104TH CONG., 2D SESS. 1996.

Agreeing with the dissent in *Free Speech*, *Amicus* asserts that the majority below misread *Ferber* and *Osborne* when they applied strict scrutiny. Justice Ferguson noted that the *Ferber* Court, when categorizing child pornography, held that "the balance of competing interests [was] clearly struck and that it [was] permissible to consider these materials as without the protection of the First Amendment." *Free Speech*, 198 F.3d at 1101 (Ferguson, J., dissenting) (quoting *Ferber*, 458 U.S. at 764). Also, in upholding Ohio's child pornography statute, the *Osborne* Court found that the "'gravity of the State's interests' outweighed [the defendant's] limited First Amendment right to possess child pornography." *Free Speech*, 198 F.3d at 1101 (Ferguson, J., dissenting) (quoting *Osborne*, 495 U.S. at 111).

These cases provide support for the argument that a balancing approach is the proper standard of judicial review for laws prohibiting child pornography. Following *Ferber* and *Osborne*, one finds that Congress had compelling justifications for proscribing virtual child pornography that clearly outweigh the *de minimis* value of such pornographic material.

B. CONGRESS'S INTERESTS IN BANNING ACTUAL CHILD PORNOGRAPHY ARE NOT LIMITED TO PROTECTING THE SUBJECTS

Opponents of the CPPA argue that the *Ferber* Court focused entirely on New York's compelling interest in protecting children who were sexually exploited through the creation of child pornography and that no such interest exists where real children are not used in the pornography's production. *Ferber*, 458 U.S. at 756-57. In fact, these

opponents cite *Ferber* as support that prohibitions on virtual child pornography are unconstitutional because "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performances or photographic or other visual reproduction of live performances, retains First Amendment protection." *Id.* at 764-65.

Amicus maintains that *Ferber's* language does not proscribe the CPPA's ban on virtual child pornography. First, the *Ferber* Court's holding was limited to those justifications for New York's child pornography laws that were presented, all of which relied on the harm to the subjects of child pornography. It is important to recognize that the technology that the CPPA addresses did not yet exist in 1982. Therefore, the New York Legislature did not consider it and this Court did not contemplate virtually realistic child pornography when *Ferber* was decided. Specifically, the Supreme Court granted New York's petition for *certiorari* to answer the following question:

> To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?

Ferber's holding is statutorily limited to actual child pornography and cannot be used to find either that the CPPA's prohibition of virtual child pornography violates the First Amendment or that Congress can only have a valid interest in child pornography laws that protect only the actual subjects of provably real child pornography.

Second, in *Osborne v. Ohio*, 495 U.S. at 111, this Court accepted two additional justifications for child pornography statutes other than protecting those children exploited in the pornography's creation. Agreeing with the Ohio Legislature and Ohio Supreme Court, this Court recognized that preventing the seduction of minors and encouraging the destruction of child pornography were valid justifications for the State's ban on the possession of child pornography. As stated in *Osborne*, 495 U.S. at 111:

> Other interests also support the Ohio law. First, as *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. 458 U.S. at 759.... The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

The First Circuit in *United States v. Hilton* upheld the constitutionality of the CPPA and stated that the *Osborne* Court intimated a "subtle, yet crucial, extension of [Congress's] legitimate interest to the protection of children not actually depicted in prohibited images." *United States v. Hilton*, 167 F.3d 61, 70 (1st Cir. 1999), *cert. denied*, 120 S.Ct. 115 (1999).

As such, Congress was justified in detailing the harms of child pornography not only to its subjects, but also to all child sexual abuse victims. Conversely, the majority of the panel below in *Free Speech* erred in determining that the protection of children used in producing child pornography

can be the only legitimate justification for prohibiting its traffic.

C. CONGRESS'S COMPELLING INTERESTS IN BANNING VIRTUAL CHILD PORNOGRAPHY

1. SEDUCTION PURPOSES.

Congress concluded, among the several factual findings codified in the CPPA, that "child pornography is often used as a part of a method of seducing other children into sexual activity," *see Free Speech*, 198 F.3d at 1099 (Ferguson, J., dissenting) (quoting CONGRESSIONAL FINDINGS), and that virtual child pornography, because it is indistinguishable from real child pornography, will have the same effect on a pedophile and the pedophile's victims as "real" child pornography. *United States v. Acheson*, 195 F.3d 645, 649 (11th Cir. 1999).

Congress relied on scientific and law enforcement authorities in supporting the conclusion that pedophiles use child pornography to seduce their victims. Dr. Victor Cline, a clinical psychologist, professor, and veteran expert witness specializing in the treatment of sexual compulsions and addictions, testified before the Senate Judiciary Committee that pedophiles use child pornography to seduce children into engaging in sexual acts with them. HEARING BEFORE THE SENATE COMM. ON THE JUDICIARY. 104TH CONG., 2D SESS. 1996. This finding is also supported by the FINAL REPORT, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY at 649 (1986). The *Osborne* Court at 495 U.S. 103, 111 n.7 relying on the same REPORT stated:

> The Attorney General's Commission on Pornography, for example, states that "Child pornography is often used as part of a method of

> seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity."

Thereafter, this Court in *Osborne* held, "states have a legitimate interest in preventing pedophiles from 'using child pornography to seduce other children into sexual activity.'" *Id.*

Despite the above support for Congress's conclusion that virtual child pornography warrants prohibition in order to prevent the sexual abuse of children, the majority in *Free Speech* argued that no factual studies currently exist linking virtual child pornography with subsequent sexual abuse of children. 198 F.3d 1083, 1093 (9th Cir. 1999). The Ninth Circuit arrived at this conclusion by ignoring the important fact that technological advances in computer imaging render it possible to produce virtual child pornography that is indistinguishable from real child pornography. Therefore, a child's inability to make this distinction renders virtual child pornography on equal footing with real child pornography to the extent that they can both be used by pedophiles to seduce victims.

Furthermore, requiring conclusive scientific proof is an error this Court rejected when a demand for such proof of obscenity was made in *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 60-63 (1973), and the Court in *Osborne*, at 108-09, recognized that the "interests underlying child pornography far exceed the interests justifying" obscenity laws.

2. PREVENTION OF PEDOPHILES FROM EVADING PROSECUTION.

The CPPA's ban on traffic in realistic, virtual child pornography is necessary to enable the Government to

continue to prosecute all child pornographers, including those who use real children in production.

Before the passage of the CPPA, the Government was required to prove that the pornographic material at issue involved a real child engaging in sexually explicit activity. (SENATE HEARING, statement of Bruce Taylor, President and Chief Counsel, National Law Center for Children and Families). Computer-generated child pornography, however, could supply "a built-in reasonable doubt standard in every child exploitation/pornography prosecution." *Id.* A defendant could argue to a jury, under § 2252, that the Government could not prove that the child pornography at issue was "real" without identifying an actual child and that computers and imaging software could create or morph images that appear to be real, thus raising a reasonable doubt as to the authenticity of a picture that is or appears to be of a minor child being molested. An expert witness on imaging so testified in the trial of a child pornographer in *United States v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995), wherein the District Court correctly instructed the jury that "the Government had the burden of proving that each item of alleged child pornography did, in fact, depict an actual minor," but the jury in 1993 could and did conclude that such imaging technology was not so widely available or used to raise a reasonable doubt that the photos were real.

In *United States v. Coleman*, ARMY No. 9801240, 2001 CCA LEXIS 3, 13, ___M.J.___ (A.Ct.Crim.App. 2001), appellant pled and was found guilty to possession of child pornography under 18 U.S.C. § 2252. Thereafter, on review, he argued that his plea was improvident because insufficient evidence existed proving that the visual depictions at issue were of an actual minor. The Army Criminal Appeals Court recognized that had appellant pled not guilty and presented evidence that the images were computer-generated:

> The government may have had difficulty proving that real children were depicted in these images.... For this reason, it may have been more prudent to charge appellant with a violation of 18 U.S.C. § 2252A, even though the constitutionality of 18 U.S.C. § 2252A is under attack. *Compare United States v. James*, 53 M.J. 612 (N.M.Ct.Crim.App. 2000) (relying on First and Eleventh Circuit Courts of Appeal decisions in holding that 18 U.S.C. § 2252A's ban of computer-generated child pornography is constitutional), *petition granted*, 2000 CAAF LEXIS, No. 00-0592/NA (Nov. 16, 2000), and *United States v. Mento*, 231 F.3d 912 (4th Cir. 2000) (18 U.S.C. § 2252A is constitutional) *with Free Speech Coalition v. Reno*, 198 F.3d 1083 (9th Cir. 1999) (holding that portions of 18 U.S.C. § 2252A are unconstitutionally vague and overbroad, but that the constitutional portions of the statute are severable).

An analogous argument is found in *Ferber* where the Court justified New York's ability to prohibit the distribution of child pornography produced outside the State, though "it is often impossible to determine where such material is produced." *New York v. Ferber*, 458 U.S. at 766 n.19. Likewise, because it is now almost impossible to determine between real and fake child pornography, such argument justifies prohibitions on interstate distribution of virtual, but authentically counterfeit, child pornography.

Furthermore, at the present time, expert testimony is not required to prove that a depiction is a photograph rather than some other type of technical reproduction, which does not depend on the use of live human subjects. *United States v. Nolan*, 818 F.2d 1015, 1017-18 (1st Cir. 1987). In *Nolan*,

the Court of Appeals found that it could "be within the range of ordinary competence for someone not a photographic expert to determine that she is viewing a photograph rather than, say, an artistic reproduction." *Id.* at 1018. This was the case when technology had not reached the point where realistic images could be created without the use of a real human model. Therefore, the prosecution was not required to rule out every conceivable way in which the child pornographic pictures could have been made.

With computer-generated child pornography on the market, it would be almost impossible for the state or federal government to prove that an image is of a real child, since even an expert may not be able to tell the difference. Therefore, pedophiles who possess and transport images of real children could be emboldened to do so without fear of punishment, making useless the existing statutes that currently prohibit traffic in "real" child pornography. Without the CPPA, a defendant would always be afforded the argument that the child is not real but instead virtual and, thus, a defendant will be able to argue a reasonable doubt that a real child was not proven to have been used in the production.

3. DESTRUCTION OF THE CHILD PORNOGRAPHY MARKET.

This Court has held that governments have an important justification for suppressing and trying to eliminate the child pornography market. In *Osborne*, 495 U.S. at 111, the Court recognized:

> The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. *Ferber*, 458 U.S. at 759. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging

> the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.

Since pedophiles could trade and sell virtual child pornographic materials instead of or in exchange for those that are of real children, virtual child pornography helps "keep the market for child pornography thriving." (S. REP. NO. 358, 104TH CONG., 2D SESS. 1996, testimony of Bruce A. Taylor, President and Chief Counsel for the National Law Center for Children and Families).

Furthermore, if the distribution of virtual child pornography is not prohibited, pedophiles who receive either form of child pornography would more than likely hold onto it, thinking that it was actually real or that they would have a good defense to any prosecution because they did not "know" their child pornography actually involved real children. The CPPA eliminates this excuse and rationalization for disseminating, receiving, or possessing child pornography. Additionally, by prohibiting the distribution of synthetic child pornography, the CPPA also decreases the supply of and demand for all child pornography.

D. BALANCE OF CONGRESS'S INTERESTS VERSUS ANY FIRST AMENDMENT INTEREST

As discussed above, Congress detailed several compelling interests for banning virtual child pornography. *Amicus* urges this Court to find that these justifications are compelling enough to outweigh the limited First Amendment interest in distributing counterfeit, "virtual" child pornography.

When reviewing the constitutionality of a statute, the Supreme Court generally accords extreme deference to the legislature when considering essentially factual assessments made with respect to the statute's enactment. *United States v. Pearl*, 89 F.Supp.2d 1237 (D. Utah 2000). In *Pearl*, the district court in upholding the CPPA, and faced with the issue of the standard to afford Congressional findings, relied on *Turner Broadcasting Sys. v. FCC*, 520 U.S. 180 (1997). In *Turner*, the Court held:

> Courts must accord substantial deference to the predictive judgments of Congress... The Court owes deference to Congress's findings out of respect for its authority to exercise the legislative power and because the latter institution is far better equipped than the judiciary to "amass and evaluate the vast amounts of data" bearing upon legislative questions... Thus, even in the realm of First Amendment questions where Congress must base its conclusions upon substantial evidence, deference must be accorded to its findings as to the harm to be avoided and to the remedial measures adopted for that end . . .

The Ninth Circuit failed to give "substantial deference" to Congress's findings and instead conducted its own weighing process, replacing its own factual findings for Congress's when it held that there exists no "demonstrated basis to link computer-generated images with harm to real children." *Free Speech*, 198 F.3d at 1094. Contrary to this determination, Congress found compelling evidence that advances in computer-imaging technology require the CPPA's proscriptions on virtual child pornography. *See* CONGRESSIONAL FINDINGS. These rationales outweigh the minimal First Amendment interest that may exist in possessing or distributing virtual child pornography.

Therefore, the balancing approach used by this Court in *Ferber* and *Osborne* sustains the constitutionality of the CPPA's ban on interstate or foreign commerce in such virtual child pornography.

II. NEW TECHNOLOGIES PROVIDING THE ABILITY TO CREATE VIRTUAL CHILD PORNOGRAPHY MAY REQUIRE INNOVATIVE JUDICIAL STANDARDS

It is undisputed that rapid technological advances have affected First Amendment jurisprudence. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) the Court struggled with defining the proper First Amendment analysis to be given to cable television regulations. *Amicus* submits that the CPPA is constitutionally valid under any standard of review. The Act passes a strict scrutiny test because of its narrow scope and incidental impact on any protected expressive claim, an intermediate level of scrutiny for its combination of conduct and alleged content characteristics, as well as any other traditional rational basis or compelling interest test. Though *amicus* submits that a strict scrutiny is inappropriate in this instance, an analysis under a fact-based, computer technology specific rationale is particularly instructive. As posed by Justice Breyer, First Amendment analysis may take into account the particular characteristics unique to the technology. This involves a fact-based determination, rather than a categorical analysis.

This view holds that the history of the Court's First Amendment jurisprudence is a continuing adaptation to changing circumstances. Justice Breyer in *Denver*, at 739-41 stated, "Over the years, this Court has restated and refined these basic First Amendment principles, adopting them more particularly to the balance of competing interests and the special circumstances of each field of application."

Justice Breyer put forth a balancing approach containing four factors. First, he ascertained the importance of the justification behind the cable regulations. As is the case with the CPPA provisions, Justice Breyer determined that there existed "an extremely important justification... the need to protect children from exposure to patently offensive sex-related material." *Id.* at 743. As previously discussed, *Amicus* has brought to the Court's attention several compelling justifications for prohibiting the viewing and distributing of virtual child pornography.

Second, the uniqueness of the situation, in that the speech interests of the programmers and the operators had to be balanced against each other. *Id.* at 743. In the instant case, this Court must weigh the *de minimis* First Amendment interest in distributing virtual child pornography with the enumerated compelling interests found by Congress in banning such traffic.

Third, he looked for analogous cases and found *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), to be on point and thereby, relied on it as precedent. *Amicus* asserts that the decisions in *Ferber* and *Osborne* are sufficiently similar to be considered precedential and supportive of the constitutionality of sections 2252A and 2256 (8).

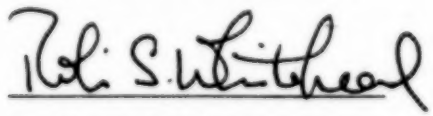
Finally, Justice Breyer reasoned that the statute was permissive in that it did not ban speech, but, instead, simply restored the speech rights of cable operators. *Denver*, 518 U.S. at 745. The CPPA does not ban materials that use adults to "portray" or "act" the role of minors, but only the conduct of distributing or possessing visual images that appear to be actual pictures of actual minors engaging in sexual exploitation.

Amicus maintains that Congress, in enacting the CPPA, has proscribed certain narrowly defined abuses of a new technology due to the very serious practical problems such abuses create. Therefore, the CPPA is valid under a balancing approach as suggested in *Denver*, under which the Government will not be required to "impose judicial formulas so rigid that they become a straitjacket that disables government from responding to serious problems." *Id.* at 741.

CONCLUSION

For all of the above reasons, your *Amicus* prays that this Honorable Court reverse the judgment of the court below and declare all provisions of the Child Pornography Prevention Act of 1996 constitutional.

Respectfully submitted,



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